

**SUPREME COURT OF NIGERIA**  
29TH JANUARY, 2010. SC. 22/2002  
**CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN,**  
**C. M. CHUKWUMA-ENEH, M. S. MUNTAKA-COOMASSIE,**  
**O. O. ADEKEYE, JJSC**

B.A.S.F NIGERIA LIMITED ..... PLAINTIFF/RESPONDENT  
AND  
FAITH ENTERPRISES LTD ..... DEFENDANT/APPELLANT

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APPEALS - Grounds of fact - Or mixed law and fact - Competence - Where the questions involve fact or mixed law and fact - Leave of court must be first sought and obtained - Else the grounds would be incompetent (H1)

APPEALS - Grounds - Nature - How determined - Court is required to examine each ground with its particulars - If it reveals a misunderstanding of the law - Or misapplication of law to proven facts - It is a ground of law (H2)

APPEALS - Competence - Grounds - Incompetence of all grounds - Effect on the appeal - Where all grounds are incompetent as in this case - The appeal is incompetent and liable to be struck out (H3)

**FACTS**

The plaintiff/respondent sued defendant/appellant at the High Court of Lagos State claiming the sum of DM 140,000.00 or its Naira equivalent as price of goods sold and delivered to appellant with interest thereon at 10% from 15th May, 1979, till judgment and thereafter at 5% until the debt is liquidated. Appellant filed its statement of defence after the closure of pleadings. Respondent then filed an application praying for an order entering judgment for respondent on the basis of a letter Exhibit B - written by one Mr. Lachmandas purportedly acting for appellant, which letter admitted the debt. Appellant filed a counter-affidavit in which it averred that Exhibit B was a fraud on it in that it was written without authority. After hearing both parties on the application, trial judge granted the application.

Aggrieved, appellant appealed to Court of Appeal which appeal was dismissed as the court held that the allegation of fraud was neither sufficiently particularised nor proved. Still dissatisfied appellant has brought this appeal against the judgment of Court of Appeal challenging same on three grounds of appeal. Respondent has however challenged the three grounds of appeal as incompetent for want of prior leave of court. It is respondent's argument that all three grounds are either grounds of fact or of mixed law and fact and requiring prior leave of court to be competent and which prior leave was neither sought nor obtained.

### **ISSUE FOR DETERMINATION**

Whether the appeal is incompetent.

**HELD** (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

#### ***Grounds of fact - Or mixed law and fact - Competence***

1. For this court to have jurisdiction to hear and determine an appeal before it, no leave is required where the grounds of appeal involves question of law alone and simpliciter. Where the questions involve facts or mixed law and fact, the leave of court must be first sought and obtained. In the latter circumstance where the required leave is not obtained, the grounds of appeal would be incompetent and liable to be struck out. This court in *Alhaji Tahir Maihoro Vs Alhaji Jibrin Garba* (1999)7 SCNJ 270 at 279 had clearly stated the Law. The statement of Ejiwummi JSC of blessed memory says:

*"It is therefore clear that the court has no jurisdiction to entertain an appeal on a ground of fact or of mixed law and fact unless of course, leave has been obtained. This point has been emphasized in a number of recent decisions."* (p. 114 G)

#### ***APPEALS - Grounds - Nature - How determined***

2. The court is required to examine thoroughly the grounds of appeal together with their particulars in order to see whether any of the grounds reveal a misunderstanding of the law by the lower court or a misapplication of the law to the facts already proved or admitted in which case it would be a question of law. Where, however, the ground is such that would require questioning the evaluation of facts by the lower court before the application of the law, that would amount to

question of mixed law and fact. Ground of appeal which raises facts which needed to be determined, either way, is a ground of fact. (p. 115 E)

***Incompetence of all grounds - Effect on the appeal***

3. Having found that the three grounds of appeal in this case are of facts and of mixed law and facts, it is my considered view that the Appellant having failed to obtain the leave of either the lower court or the Supreme Court before filing this appeal have ran foul of Section 233 (3) of the 1999 Constitution. Hence, the grounds of appeal are incompetent, consequently all the issues for determination distilled from the incompetent grounds of appeal and the arguments based on them are incompetent and they are therefore struck out. The legal consequence of the above is that there is nothing before this court as the whole appeal is incompetent and is liable to be struck out. (p. 116 E)

**NOTABLE POINTS OF INTEREST**

**MOHAMMED JSC**

*1. Appeal is with leave under s. 233 (3) of the Constitution*

Whereas an intending Appellant can validly exercise his right of appeal as of right and at will to this Court under Section 233(2) of the 1999 Constitution within the time fixed by the Supreme Court Act and the rules of this Court, leave of the Court of Appeal or of this Court is a condition precedent under sub-section (3) of section 233 of the Constitution to the exercise of that right of appeal. The law is therefore trite in this respect that where the condition precedent to the exercise of the right of appeal is necessary but has not been fulfilled, there is no appeal. To use the legal term, the appeal is then said to be incompetent. (p. 121 F)

**ADEKEYE JSC**

*2. Action - Abuse of mandatory requirement is fatal*

Where the law specifically directs the conformity to a mandatory requirement, the resultant absence of compliance ought to be fatal. In the instant case where a ground of appeal is filed without leave, where one is required before appeal, such an appeal is incompetent and is liable to be struck out. (p. 125 G)

**REPRESENTATION**

H. M. Liman with I. M. Iliyasu, I. M. Dikko and T. N. Akosu (Miss) for the Appellant

Philip Ndubuisi Umeh for the Respondent

B

**CASES REFERRED TO**

Shanu V Afribank (Nig) Plc 2 WRN 1 at 4

Ajao v. Alao (1986) 5 NWLR pt. 45 pg. 802

C Udene v. Ugwu (1997) 3 NWLR pt. 491 pg. 57

Bereyin v. Gboko (1989) 1 N.W.L.R. (Pt. 97) 372

ERISI V. DIKA (1987) 3 NWLR (Pt 66) 503 at 510

Onifade V Olayiwole (1990) 7 NWLR (pt 161) 130

Nwadike v. Ibekwe (1987) 4 NWLR pt. 67 pg. 718

D Abisi v. Ekwealor (1993) 6 N.W.L.R. (Pt. 302) 643 at 66

NSIRIM V. NSIRIM (1990) 3 NWLR (Pt 138) 285 at 297

Ogbechie v. Onohie (1986) 2 N.W.L.R. (Pt. 23) 484 at 491

Ejiwummi V Constain (W. A) Plc (1998) 12 NWLR (Pt 576) 149

AKWIWU MOTORS LTD V. SANGONUGA (1984) 5 SC 184 at 186

E Ugboaja v. Akintoye-Sowemimo (2009) 16 NWLR pt. 1113 pg. 278

Alhaji Tahir Maihoru Vs Alhaji Jibrin Garba (1999) 7 SCNJ 270 at 279

Intergrated Builders v. Damzag Ventures (Nig.) Ltd. (2005) 2 NWLR pt. 909 pg. 97

F

**STATUTE REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 233

G

**LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

The Respondent herein which was the plaintiff at the trial court claimed against the Appellant, the defendant at the High Court Lagos State in its amended statement of claim as follows: -

H *“Whereof the plaintiff claims against the defendant the said sum of Dm 140,000.00 or its Naira equivalent based on the prevailing rate of exchange of the day the judgment as price of goods sold and delivered to the defendant, been N11,668.41 already paid with interest thereon at the rate of 10% from the 15<sup>th</sup> of May, 1979 to the*

*date of judgment and thereafter at 5% until the whole debt is liquidated”.*

The Appellant filed its statement of defence after the closure of pleadings, the Respondent filed an application dated 15/9/1992, wherein it prayed the trial court for the following; -

*“AN ORDER to enter judgment for the Plaintiff/Applicant as per the further amended writ of summons and statement of claim upon admission by the Defendant/Respondent”.* The application was based on Exhibit B, wherein the defendant was alleged to have admitted the claim of the Respondent. The Appellant filed a counter - Affidavit dated 23/8/92 and in paragraph 7, it was averred as follows: -

*“7. That the purported admission by the defendant company was made in fraud of the defendant company and the defendant has consistently stated this in the statement of defence”.*

Both parties were heard on the application by the trial Judge. On the 3/3/95, the trial Judge Segun J delivered his ruling and granted the Respondents application. On page 166 of the Record he held: -

*“As at 3rd August, 1979 the defendant/respondent mandated Mr. Lachmandas to operate its accounts at the Union Bank of Nigeria Ilupeju Branch, Lagos. They now make allegation of fraud against Lachmandas who was the alter ego of the defendant/company. The acts of Lachmandas were therefore not of the agent of the company but that of the company itself. (Sections 65 and 70 company and Allied Matters Act). Unless the defendants (Sic) can show that plaintiffs (Sic) colluded with the Managing Director and General Manager of the Defendant Company, against whom allegations of fraud were made, the defendant albeit, without particulars to perpetrate a fraud against the defendants would still be liable to pay its debt to the Plaintiff/Applicant.....”*

*It seems to me that the defendants have no defence to this action. It is most in expedient to allow a defendant who has no real defence to the action to defend for mere purpose of delay.*

*This court would not encourage that”.*

The defendant was dissatisfied with this ruling and an appeal was therefore lodged by him before the Court of Appeal Lagos Division, hereinafter called the lower court. After hearing the Appellants appeal, the lower court in its unanimous judgment dismissed

the appeal. In the lead judgment of P. A. Aderemi JCA (as he then was), it was held as follows: -

*"The attack offered to the assertion of admission is that it was made in fraud of the defendant. That is a general allegation. And it is now well settled, in law that general allegations however strong was (sic) in sufficient to amount to an averment of fraud of which account of law can take notice see: -UHUNMWAANGHO Vs OKOJIE & ORS (1982) 9 SC 101. It need be said that fraud is a serious crime and in civil matters the particulars must be pleaded and proved strictly. See FABUNMI Vs AGBE (1985) 3 SC. 28. Beyond the bare assertion of fraud the processes filed by the Defendant/Appellant are devoid of any particulars let alone proof of same. The author of Exhibit B-Lachmandas was at the material time, the Managing Director of the defendant/company. In law the state of mind of Lachmandas, his acts are all regarded as those of the defendant/company, a legal fiction that only exists in the eye of the law ... ". See pp233-at p234 of the Record of proceedings".*

The Appellant was again dissatisfied with the decision of the court below had appealed to this court on the following grounds - I reproduce them hereunder with their particulars for the sake of clarity: -

**GROUND I: -**

The Learned Judges of the Court of Appeal misdirected themselves, on the facts and thereupon Arrived at a wrong conclusion in law when they held as follows: -

‘...The author of Exhibit “B” Mr. Lachmandas was at the material time the Managing the Director of the Defendant Company’.

‘.....At the close of the pleadings, it seems to me that only inference that can be drawn is that the defendant appellant directing in writing the payment of the debt as averred in the further amended statement of claim is directly admitted or deemed to have been admitted. I answer in the affirmative issue I in the respondent’s brief saying that exhibit B is a clear admission of the debt and the Defendant/Appellant had no defence to the suit” ...When the Appellant denied all material averments in the Amended Statement of claims.

**PARTICULARS OF MISDIRECTION**

1. At the material time Mr. S. E. Idemudia was the Chairman/ Managing Director of the Defendant Company.

2. At the material time Mr. Lachmandas was only a middle-man between Kewalram private Limited of Singapore and Faith Enterprises Limited the Appellant Company. He was a guarantor to Faith Enterprises Limited. In that capacity he was to guarantee payment by Faith Limited to Kewalram Private Limited of Singapore for the Industrial machines and one consignment of raw materials which Mr. Lachmandas ordered for the Appellant Company. B

3. The function of Mr. Lachmandas in the Appellant company are clearly elaborated upon in page 161 of the records, Appellant's further Amended Statement of Defence and Counter-claim dated and filed on 16/2/95. C

4. In its further Amended Statement of Defence filed on 16/2/95 the Appellant denied all the material averments in the amended statement of claim.

5. There is no evidence that the Appellant authorized Exhibit D "B", the mandate by the Appellant to Lachmandas was limited to payment for the foods imported by him on behalf of the Appellant from Kewalrams Private Limited of Singapore.

#### GROUND II: -

The Learned Appellate Judges of the Court of Appeal erred in law when they held as follows: - E

*"..... I answer issues 1 & 2 in the Appellant's brief in the affirmative. I answer in the affirmative issue 1 in the Respondent's brief saying that Exhibit "B" is a clear admission of the debt and the Defendant/Appellant had no defence to the suit. And I also answer issue 2 in the Respondent's brief in the negative-it was not denied fair hearing".* F

When the Appellant filed a further Amended Statement of Defence on 16/2/95 but the issue of the counter-claim was never considered at the trial. The whole trial was never concluded. G

#### PARTICULARS OF ERROR

1. The Appellant filed its further Amended Statement of Defence on 16<sup>th</sup> February, 1995.

2. The said Further Amended Statement of Defence was before the trial Judge and the Judges of the Court of Appeal at all material times. H

3. In the Appeal before the Appeal Court, Lagos, the Judgment of the High Court dated the 3<sup>rd</sup> day of March 1995 has been

held to be final judgment.

4. The Lagos High Court did not consider the Appellant's counter-claim but struck it out on 9/7/96.

5. The decision of the High Court Lagos appealed against by the Appellant was made on 3<sup>rd</sup> day of March 1995. The Appellant filed its appeal on the 3/4/95.

6. The Court of Appeal in effect held that the Appellant was given a fair hearing.

### GROUND III

The Learned Judges of the Court of Appeal erred in law when they held as follows:

*"..... I answer issues 1 & 2 in the Appellant's Brief in the affirmative. I answer in the affirmative issue I in the Respondent's. Brief saying that Exhibit "B" is a clear admission of the debt that the Defendant/Appellant had no defence to the suit, "it seems to me that the Defendants have no defence to this action, it is most inexpedient to allow a defendant who has no real defence to the action to defend for mere purpose of delay".*

When the Appellant filed a Further Amended Statement of Defence on 16/2/95 but issues of its counter claim was never considered throughout the trial.

### PARTICULARS OF ERROR

1. The Appellant filed its further Amended Statement of defence and Counter claim on 16<sup>th</sup> day of February, 1995.

2. The said Further Amended Statement of Defence and Counter claim was before the High Court of Lagos State from 16/2/95.

3. The decision of the High Court of Lagos appealed against by the Appellant was made on 3<sup>rd</sup> day of March, 1995.

4. The decision was a final decision.

5. The Appellant appealed against the said decision of High Court of Lagos State on 3<sup>rd</sup> day of April, 1995.

6. The High Court of Lagos was of the view that the Appellant had no "real defence to the action". In effect the Learned Judges of the Court of Appeal upheld that view.

7. The Defence of the Appellant filed on 16/2/95 was not considered by the Lagos High Court and consequently the Lagos High Court did not give the Appellant fair hearing of its defence.



Erroneously the Court of Appeal upheld the decision of the High Court Lagos.

In accordance with the rules of this court both parties filed and exchanged their Briefs of argument. The appellant in its brief of argument dated 2/1/02 formulated two issues for determination. The Respondent in its brief of argument dated 19/2/07 equally formulated two issues. There is no pressing need for me to reproduce the issues. B

Before proceeding to consider the submissions of the learned counsel to the parties on the substantive matter as contained in their respective briefs of argument, it is pertinent in my view to consider an important issue of jurisdiction raised by the respondent herein. This is so because the issue of jurisdiction is so fundamental, and being a threshold issue it is imperative to have it determined first before proceeding to the substantive matter since lack of it would deprive this court the power to pronounce on the main issue. C D

The Respondent filed a Notice of preliminary objection dated 19/01/07, where he contends that the appeal is incompetent and urged this court to strike it out. The grounds of this application are stated thus: - E

*“(i) None of the grounds of appeal involves question of law alone and no leave was obtained to file them.*

*(ii) The particulars of misdirection given under ground I of the grounds of appeal were not facts before or properly before the lower court nor were they part of the case of the Appellant at the trial court.* F

*(iii) Ground II of the grounds of appeal is clumsy, vague and does not attack the ratio decidendi.*

*(iv) Ground III of the grounds of appeal is a repetition of ground ii with addition of a quotation taken not from the High Court decision.* G

*(v) The reliefs sought are incompetent”.*

The respondent argued this issue in its Brief of argument. It was the submission of the learned counsel to the Respondent that subject to the provisions of Section 233(2) of the 1999 Constitution of the Federal Republic of Nigeria, this court can entertain an appeal involving questions of fact or mixed law and fact *only* with the leave of the Court of Appeal or the Supreme Court obtained pursuant to Section 233(3) of the Constitution. Learned Counsel submitted that H

Ground I of the ground of appeal involves questions of fact while Grounds II and III involve questions of mixed law and facts and the Appellant having failed to obtain the leave of either the lower court or this court, the appeal therefore becomes incompetent, the cases of AKWIWU MOTORS LTD V. SANGONUGA (1984) 5 SC 184 at 186; and ERISI V. DIKA (1987) 3 NWLR (Pt 66) 503 at 510 were cited.

The learned counsel referred to the particulars under the “Particulars of misdirection”, and submitted that they are not borne out of the record, and thus submit that they were not properly before the court, and cannot therefore form the basis of misdirection. Thus leaving the allegation of misdirection without any particulars contrary to Order 8 Rule 2 renders same liable to be struck out. The case of NSIRIM V. NSIRIM (1990) 3 NWLR (Pt 138) 285 at 297 was cited in support.

On ground II, the learned counsel submitted that it is clumsy and vague and fails to attack *the ratio decidendi* but merely quotes the conclusion reached by the lower court and the particulars of error given and those which do not have any bearing on the passage quoted. The learned counsel for the Respondent therefore urged this court to hold that grounds of appeal are incompetent and consequently urged this court to strike them out.

Surprisingly, the Appellant kept mum and did not file any reply to this Notice of Preliminary Objection. In my view the issue is deemed to have been admitted. Nonetheless I shall proceed to determine the matter on its own merit.

I have closely and carefully gone through the record of proceeding and it is not in doubt that no leave of court, either of the lower court or this court was obtained before this appeal was filed.

**For this court to have jurisdiction to hear and determine an appeal before it, no leave is required where the grounds of appeal involves question of law alone and simpliciter. Where the questions involve facts or mixed law and fact, the leave of court must be first sought and obtained. In the latter circumstance where the required leave is not obtained, the grounds of appeal would be incompetent and liable to be struck out. This court in Alhaji Tahir Maihoro Vs Alhaji Jibrin Garba (1999)7 SCNJ 270 at 279 had clearly stated the Law. The**

statement of Ejiwummi JSC of blessed memory says:

***“It is therefore clear that the court has no jurisdiction to entertain an appeal on a ground of fact or of mixed law and fact unless of course, leave has been obtained. This point has been emphasized in a number of recent decisions; it is enough to refer to only the following: -***

*Ohiwele V Lagos State Development Property Corporation (1983) 5 SC1; Olojuon V Ozima (1985) 2 NWLR (pt 6) 167 at pages 176 - 188; and J. B. Ogbechie & Ors V Gabriel Onochie (1986) 2 NWLR 484. One of the obvious result of the state of the law is that where an appellant’s grounds of appeal are only of facts or mixed law and fact, the grounds, and hence the appeal must be struck out and unless leave had been Obtained.” On the other hand, where no leave had been obtained and some of the grounds are of law and others are either facts or mixed law and facts, only those which are grounds of law are competent. All grounds of fact or mixed law and facts must be struck out”.*

*(Italics mine for emphasis)*

As I had earlier pointed out, no leave was obtained before this appeal was filed, the question to be answered now is whether the three grounds of appeal in this case are grounds of law, or facts, and or of mixed law and facts? ***The court is required to examine thoroughly the grounds of appeal together with their particulars in order to see whether any of the grounds reveal a misunderstanding of the law by the lower court or a misapplication of the law to the facts already proved or admitted in which case it would be a question of law. Where, however, the ground is such that would require questioning the evaluation of facts by the lower court before the application of the law, that would amount to question of mixed law and fact. Ground of appeal which raises facts which needed to be determined, either way, is a ground of fact”.***

See this court’s decision in the following cases:-

1. Onifade V Olayiwole (1990) 7 NWLR (pt 161) 130
2. Olanrewaju V Ogunleye (1997) 2 NWLR (pt 485) 12 J.
3. Shanu V Afribank (Nig) Plc 2 WRN 1 at 4.
4. Obatoyin V Ejedike (1996) 4 SCNJ 249.

The point must also be stressed here that the mere fact that an

appellant describes a ground of appeal as of fact as aground of law would not necessarily render it to be so, the court would still inquire whether ground of appeal described as ground of law is actually (or in fact) a ground of law or of a mixed law and fact, and/or is of facts alone. See *Ejiwummi V Constain (W. A) Plc (1998)12 NWLR (Pt B 576) 149.*

Applying these principles to the instant case, Ground I of the grounds of appeal is indisputably a ground of facts alone. The Ground as framed started thus:-

C *“The learned Judges of the Court of Appeal misdirected themselves on the facts and thereupon arrived at a wrong conclusion ...”* It relates to the conclusion or findings of fact of the lower court on the disputed Exhibits B.

D While grounds II and III though numbered separately, are the same in words and contents, challenged also the finding of the lower court on the disputed Exhibit B, it involves the consideration of facts as to whether exhibit B amounts to an admission of the claims of the Respondent, and the facts of the duties and obligations of Mr. Lachmandas. To my mind, these grounds of appeal are of mixed law E and facts.

My Lords, ***having found that the three grounds of appeal in this case are of facts and of mixed law and facts, it is my considered view that the Appellant having failed to obtain the leave of either the lower court or the Supreme Court before filing this appeal have ran foul of Section 233 (3) of the 1999 Constitution. Hence, the grounds of appeal are incompetent, consequently all the issues for determination distilled from the incompetent grounds of appeal and the arguments based on them are incompetent and they are therefore struck out. The legal consequence of the above is that there is nothing before this court as the whole appeal is incompetent and is liable to be struck out.*** The appeal is struck out by me. I award costs of N50,000.00 in favour of the Respondent.

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### **MOHAMMED JSC**

This appeal is against the decision of the Lagos Division of the Court of Appeal given on 11<sup>th</sup> December, 2000, dismissing the

Appellant's appeal and affirming the judgment of the Lagos State High Court of Justice in favour of the Respondent against the Appellant which was the Defendant, in the sum of DM140,000 or its Naira equivalent based on the then prevailing rate of exchange less the sum of N11,688.41 already paid by the Defendant/Appellant for the price of goods sold and delivered. B

The Appellant which was not happy with the decision of the Court of Appeal against it has now appealed to this Court on three grounds of appeal from which the following two issues were distilled in the Appellant's brief of argument.

*"1. Did the Court of Appeal consider the Defence of the Appellant in the lower Court (viz the denials of the Appellants, the position and duties of Lachmandas in the Appellant's Company and the effect of Exhibit B, having regard to the relationship Between Lachmandas and the Appellant as clearly spelt out in the Appellant's Further Amended Statement of Defence and Counter-claim dated 16/2/1995. C*

*2. In the circumstances of this case was the Court of Appeal right in holding (as the lower Court did) that the Appellant was allowed a fair hearing in the lower Court.)"* E

While adopting the second issue for determination on the question of the alleged denial of fair hearing in the Appellant's brief, the Respondent in its brief of argument decided to reframe the Appellants first issue as follows -

*"Whether in arriving at its decision the Court of Appeal properly considered all the relevant materials before it."* F

However, by a Notice of Preliminary Objection filed on 20<sup>th</sup> February, 2007, the Respondent attacked the three grounds of appeal filed by the Appellant. This objection reads - G

"TAKE NOTICE that the Respondent shall at the hearing of this appeal contend by way of preliminary objection that the appeal is incompetent and should be struck-out.

#### GROUND OF OBJECTION

1. None off the grounds off appeal involves questions of law alone and no leave was obtained to file them. H

2. The particulars of misdirection given under Ground 1 of the Grounds of Appeal were not facts before the lower Court nor were they part of the case of the Appellant at the trial Court. G

3. Ground II of the Grounds of Appeal is clumsy, vague and does not attack the ratio decidendi.

4. Ground III of the Grounds of Appeal is a repetition of Ground II with addition of a quotation taken not from the Court of Appeal judgment but from the High Court decision.

B 5. The reliefs sought are incompetent.

Starting with the first ground of objection, learned Counsel to the Respondent relying on the provisions of Section 233(3) of the 1999 Constitution had argued that all the three grounds of appeal of the Appellant being grounds of fact or mixed law and fact, in the absence of leave sought and granted by the Court of Appeal or this Court, are incompetent and consequently the appeal itself is incompetent and liable to be struck out on the authorities of *Akwiwu Motors Ltd. V. Sangonuga* (1984) 5 S. C 184 at 186 and *Erisi v. Idika* D (1987) (Pt. 66) 503 at 510H - 511D and 516CE.

There was no response to these arguments in support of the Respondents Preliminary Objection to the three grounds of appeal filed by the Appellant as there was no Appellant's reply brief filed by the Appellant to ward off the attack on the grounds of appeal. These E three grounds of appeal as variously couched by the learned Counsel for the Appellant as contained at pages 238 - 241 of the record are -

#### GROUND I

F The learned Judges of the Court of Appeal misdirected themselves on the facts and thereupon arrived at a wrong conclusion in Jaw when they held as follows:

“..... the author of Exhibit “B”

G Mr. Lachmandas was at the material time the Managing Director of the Defendant Company.

“..... At the close of the pleadings, it seems to me that the only inference that can be drawn is that the Defendant Appellant directing in writing the payment of the debt as averred in the further amended statement of claim is directly admitted or deemed to have been admitted. I answer in the affirmative issue I in the Respondent's brief saying that Exhibit B is a clear admission of the debt and the Defendant/Appellant had no defence to the suit” ..... When the Appellant denied all material averments in the Amended Statement of Claim.

#### PARTICULARS OF MISDIRECTION

1. At the material time Mr. S. E. Idemudia was the Chairman/ Managing Director of the Defendant Company.

2. At the material time Mr. Lachmandas was only a middle-man between Kewalram Private Limited of Singapore and Faith Enterprises Ltd, the Appellant Company. He was a guarantor to Faith Enterprises Ltd. In that capacity he was to Guarantee payment by Faith Enterprises Limited to Kewalram Private Limited of Singapore for the industrial machines and one consignment of raw materials which Mr. Lachmandas ordered for the Appellant Company.

3. The function of Mr. Lachmandas in the Appellant Company are clearly elaborated upon in paragraph 4 of the Appellant's further Amended Statement of Defence and Counter-Claim dated and filed on 16<sup>th</sup> February, 1995.

4. In its further Amended Statement of Defence filed on 16<sup>th</sup> February, 1995 the Appellant denied all the material averments in the amended statement of claim.

5. There is no evidence that the Appellant authorized Exhibit "B," the mandate by the Appellant to Lachmandas was Limited to payment for the Goods imported by him on Behalf of the Appellant from Kewalrams Private Limited of Singapore.

## GROUND II

The learned Appellate Judges of the Court of Appeal erred in Law when they held as follows:-"..... I answer issues 1 & 2 in the Appellant's brief in the affirmative. I answer in the affirmative issue I in the affirmative issue I in the Respondent's brief saying that Exhibit "B" is a clear admission of the debt and the Defendant/Appellant had no defence to the suit. And I also answer issue 2 in the Respondent's brief in the negative -it was not denied fair hearing."

When the Appellant filed a further Amended Statement of Defence on 16<sup>th</sup> February, 1995 but the issue of the counter-claim was never considered at the trial. The whole trial was never concluded.

## PARTICULARS OF ERROR

1. The Appellant filed its Further Amended Statement of Defence on 16<sup>th</sup> February, 1995.

2. The said Further Amended Statement of Defence was before the trial Judge and the Judges of the Court of Appeal at all material times.

3. In the appeal before the Appeal Court, Lagos, the Judgment of the High Court dated the 3<sup>rd</sup> day of March, 1995 has been held to be final Judgment.

4. The Lagos High Court did not consider the Appellant's Counter-claim but struck it Out on 9<sup>th</sup> July, 1996.

B 5. The decision of the High Court Lagos appealed against the Appellant was made on 3<sup>rd</sup> day of March 1995. The Appellant filed its appeal on the 3<sup>rd</sup> April, 1995.

C 6. The Court of Appeal in effect held that the Appellant was given a fair hearing.

### GROUND III

The learned Judges of the Court of Appeal erred in law when they held as follows:-

D "..... I answer Issues 1 & 2 in the Appellant's brief in the affirmative. I answer in the affirmative issue I in the Respondent's brief saying that Exhibit "B", is a clear admission off the debt and the Defendant/Appellant had no Defence to the suit,

E "it seems to me that the Defendants have no Defence to this action. It is most inexpedient to allow a Defendant who has no real defence to the action to defend for mere purpose of delay."

When the Appellant filed a Further Amended Statement of Defence on 16<sup>th</sup> Febraury, 1995 but issues of its counter-claim was never considered throughout the trial.

### PARTICULARS OF ERROR

F 1. The Appellant filed its Further Amended Statement of Defence and Counter-claim on 16<sup>th</sup> day of Febraury, 1995.

G 2. The said Further Amended Statement of Defence and Counter-claim was before the High Court of Lagos State from the 16<sup>th</sup> February, 1995.

3. The decision of the High Court of Lagos appealed against by the Appellant was made on 3<sup>rd</sup> day of March, 1995.

4. The decision was a final decision.

H 5. The High Court of Lagos State was of the view that the Appellant had no "real defence to the action." In effect the learned Judges of the Court of Lagos State on 3<sup>rd</sup> day of April, 1995.

6. The High Court of Lagos State was of the view that the Appellant had no "real defence to the action." In effect the learned



Judges of the Court of Appeal upheld that view.

7. The Defence of the Appellant filed on 16<sup>th</sup> February, 1995 was not considered by the Lagos High Court and Consequently the Lagos High Court did not give the Appellant fair hearing of its Defence. Erroneously the Court of Appeal upheld the Decision of the High Court Lagos. B

Looking at the above grounds of appeal there is no doubt whatsoever that all the grounds are mainly attacking the findings of the trial Court as affirmed by the Court of Appeal on the evidential value of the letter Exhibit 'B' written by one Mr. Lachmandas. The letter as can be seen from part of the judgment of the Court of Appeal quoted in Ground I above, was duly pleaded by the Plaintiff/Respondent admitted in evidence and relied upon by the trial Court in its judgment for the Respondent based on the ground that by Exhibit 'B', the claims of the Plaintiff/Respondent had been clearly admitted by the Defendant/Appellant to warrant granting the claims. C

It is also clear from these grounds of appeal as couched by the Appellant, that the Appellant is asserting that Exhibit 'B' cannot be regarded as an admission of debt by it because the letter was not authorized by it. This assertion however, was not accepted and believed by the trial Court which found for the Plaintiff/Respondent. All the grounds of appeal therefore clearly originated or based on disputed facts between the parties and hence are grounds of facts or mix law and facts. See *Ogbechie v. Onohie* (1986) 2 N.W.L.R. (Pt. 23) 484 at 491. They are therefore grounds of facts or at least grounds of mixed law and facts which by the provisions of Section 233(3) of the 1999 Constitution, cannot be appealed against as of right but with the leave of the Court of Appeal or of this Court. In other words, whereas an intending Appellant can validly exercise his right of appeal as of right and at will to this Court under Section 233(2) of the 1999 Constitution within the time fixed by the Supreme Court Act and the rules of this Court, leave of the Court of Appeal or of this Court is a condition precedent under sub-section (3) of section 233 of the Constitution to the exercise of that right of appeal. The law is therefore trite in this respect that where the condition precedent to the exercise of the right of appeal is necessary but has not been fulfilled, there is no appeal. To use the legal term, the appeal is then said to be incompetent. Any notice of appeal filed with only such grounds of facts or D  
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mixed law and facts without first seeking and obtaining the required leave, is incompetent, void and of no effect. See *Olowosoke v. Oke* (1972) 11 S. C. I. Such incompetent Notice of appeal and grounds of appeal are liable to be struck out. See *Akwiwu Motors Ltd. And Anor. v. B. O. Songonuga* (1984) 5 S.C. 184 at 186 where Obaseki  
B JSC stated the position.

*“This Court in a series of cases, decided that where grounds of appeal involve questions of mixed law and facts, leave of the Court must be obtained to make the appeal competent and invest the Supreme Court with jurisdiction to hear the appeal.”*

C See also the cases of *Esiri v. Edika* (1987) 3 N.W.L.R. (Pt. 66) 503 at 510 -511; *Bereyin v. Gboko* (1989) 1 N.W.L.R. (Pt. 97) 372 and *Abisi v. Ekwealor* (1993) 6 N.W.L.R. (Pt. 302) 643 at 66.

In the case at hand, as it is not disputed at all that the three  
D grounds of appeal filed in the notice of appeal by the Appellant are grounds of facts and mixed law and facts, it follows therefore that the right to have appealed thereon could only have been exercised with leave. I have carefully scrutinized the record of this appeal and there is no where therein any trace of leave sought or obtained by the  
E Appellant. On the state of the law on the subject, I have no hesitation in upholding the Respondent’s Preliminary Objection and in coming to the conclusion that all the grounds of appeal filed by the Appellant in the purported exercise of its right of appeal against the decision of  
F the Court of Appeal, are incompetent by virtue of Section 233(3) of the 1999 Constitution and accordingly the three grounds of appeal, the Appellant’s notice of appeal and consequently the appeal itself are hereby struck-out.

With this outcome on the incompetence of all the three grounds  
G of appeal and the striking out of the appeal, the need to re-examine the same grounds of appeal individually to see if any of the grounds is incompetent on other grounds of the alleged absence of particulars and others, can hardly arise in the absence of the grounds themselves.

H I am therefore fully with my learned brother Coomassie JSC in his lead judgment that the Appellant’s appeal is incompetent.

There shall be N50,000.00 costs to the Respondent against the Appellant.

**ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal Holden at Lagos in appeal NO.CA/L/288/96 delivered on the 11<sup>th</sup> day of December, 2000 in which the court dismissed the appeal of the appellant against the judgment of the High Court of Lagos State in suit NO.LD/31/82 delivered on the 3<sup>rd</sup> day of March, 1995 in which it entered judgment in favour of the plaintiff/respondent on a claim of debt. B

Against that judgment, learned counsel for the appellant filed a notice of appeal of three grounds as can be seen at Pages 238 - 342 of the record. Both parties have filed and exchanged their briefs of argument. C

However, the respondent has raised a preliminary objection against the grounds of appeal contained in the notice of appeal aforesaid and has canvassed arguments thereon in his brief deemed filed on the 12<sup>th</sup> day of June, 2007 and adopted in argument during the oral hearing of the appeal on the 29<sup>th</sup> day of November, 2009 contending therein that the grounds of appeal are incompetent in that they involve facts or mixed law and facts for which leave of the court is needed to make them valid and that since the appellant obtained no such leave before filing the notice of appeal or at all, the appeal is incompetent and ought to be struck out. E

It is important to note that learned counsel for the appellant filed no reply brief to counter the argument of counsel for the respondent. Ground 1 of the grounds of appeal complains, *inter alia* as follows:- F

*“ The learned judges of the Court of Appeal misdirected themselves on the facts and thereon arrived at a wrong conclusion in law when they held as follows:- G*

*Grounds 2 and 3 though christened Error in law are in fact of mixed law and facts when looked at closely particularly with reference to the particulars of the grounds supplied by learned counsel. It is clear from the record that appellant obtained no leave of the court in filing the appeal as required by law”. H*

I have gone through the record carefully and have no hesitation in agreeing with learned counsel for the respondent that the above ground is on a misdirection on the facts as complained above.

There is no record of any leave of the court being obtained before filing the ground of appeal in issue.

I therefore agree with the reasoning and conclusion of my learned brother MUNTAKA-COOMASSIE JSC that the appeal is incompetent and should be struck out. I order accordingly and abide by the consequential orders contained in the said lead judgment including the order as to costs.

Appeal struck out.

C

### **CHUKWUMA-ENEH JSC**

I have read in draft before now the judgment of my learned brother Muntaka-Coomassie JSC just delivered. I agree with him that the appeal being incompetent should be struck out and that the decisions of the two courts below should therefore stand. I endorse the order as to costs as in the lead judgment.

E

### **ADEKEYE JSC**

I was privileged to read before now the judgment just delivered by my learned brother, M.S. Muntaka-Coomassie, JSC. The facts of the case and the judgments of the two lower courts are as stated in the leading judgment. The respondent in the appeal raised a preliminary objection urging this honourable court to dismiss the appeal as incompetent and lacking in merits particularly because the appellant failed to obtain leave to appeal on grounds of fact and mixed law and facts. In the Notice of Appeal dated the 6<sup>th</sup> of March 2001 at pages 238 to 242 of the Record, the appellant raised three grounds of appeal. The respondent argued and submitted that Ground I of the appellant's ground of appeal involves questions of fact, while Grounds II and III involve questions of mixed law and facts. The appellant required leave of this court before filing the appeal subject to the provisions of Section 233(2) of the Constitution and pursuant to Section 233(3) of the Constitution. The respondent cited cases in support.

Akwiwu Motors Ltd. v. Sangonuga (1984) 5 SC pg. 184 at 186. Erisi v. Idika (1987) 3 NWLR pt. 66 pg. 503.

The appellant did not react to this preliminary objection as there was no Reply brief filed.

Where an objection is raised in respect of the competence of an appeal, the jurisdiction of the court to entertain the appeal becomes an issue. The court has a fundamental duty before delving into the merits or substance of the appeal. B

U.B.A. Plc v. A.C.B. (Nig.) Ltd. (2005) 12 NWLR pt. 939 pg. 232

Tiza v. Begha (2005) 15 NWLR pt. 949 pg. 616

Intergrated Builders v. Damzag Ventures (Nig.) Ltd. (2005) 2 C  
NWLR pt. 909 pg. 97

Buhari v. Obasanjo (2005) 13 NWLR pt. 941 pg. 1

ANPP v. R.O.A.S.S.D. (2005) 6 NWLR pt. 920 pg. 140

A-G Lagos State v. Dosunmu (1989) 3 NWLR pg. Ill pg. 552.

A court is only competent when a case comes before it by due D  
process of court and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Section 233 (1) of the Constitution of the Federal Republic of Nigeria stipulates that -

233 (1) - The Supreme Court shall have jurisdiction to the E  
exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

233 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in certain cases.

233 (3) Subject to the provisions of subsection (2) of this F  
Section an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.

Where the law specifically directs the conformity to a manda- G  
tory requirement, the resultant absence of compliance ought to be fatal. In the instant case where a ground of appeal is filed without leave, where one is required before appeal, such an appeal is incompetent and is liable to be struck out.

In determining whether a ground of appeal is one of law or of H  
fact or of mixed law and fact, it is relevant to read the ground of appeal together with the particulars of error alleged, as portraying a ground as a ground of law by the appellant is not sufficient to make it one of law. In short, the appellant's counsel may portray a ground

of appeal as a ground of law whereas it is in fact a ground of fact or of mixed law and fact.

A ground of law has the undermentioned meanings -

(a) A question in which the court has no discretion to exercise because it has to be answered in accordance with a principle of law. It is already predetermined and resolved by the law.

(b) A question which calls for the argument and determination of what the true position is in law - such usually arises out of the uncertainty of the law.

(c) Interpretation of documents which is a question of fact but is strictly within the duty of a court.

While the meaning of a question of fact in a ground of appeal relate to -

(a) Any question not determined by the principle of law.

(b) Any question except that which relates to what the law is.

(c) Any question that is to be answered by the jury rather than the judge.

The principles guiding the court in a circumstance to determine whether a ground of appeal is one of law, or of fact or of mixed law and fact are as follow -

(1) Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground is of mixed law and fact.

(2) A ground which challenges the findings of fact or issue of law and mixed fact considered by a trial court is one of law and fact.

(3) A question arising out of the evaluation of the evidence tendered at the trial is a ground of fact.

(2) A ground of appeal which arises out of misunderstanding of the law by a trial or appellate court or misapplication of the law to the proved or admitted facts is a ground of law.

(3) A complaint about wrongful admission of evidence is also a question of law.

(4) A complaint in a ground of appeal of failure of a court to discharge its judicial duty of considering or pronouncing on the issues before it involves a question of law alone *Nwadike v. Ibekwe* (1987) 4 NWLR pt. 67 pg. 718 *Ogbochie v. Onochie* (1986) 2 NWLR pt. 23 pg. 484 *Anoghalu v. Oraelosi* (1999) 13 NWLR pt. 634 pg. 297

I have gleaned through the three grounds of appeal filed by

the appellant in this appeal. It is my conclusion based on the principles enumerated above that the three grounds of appeal are of mixed law and fact. Ground one complained about misdirection of the court on the facts and thereafter arrived at a wrong conclusion in law. Grounds two and three which are similarly framed, complained about interpretation of Exh. B in the light of the evidence available on the pleadings of the parties - particularly Further Amended Statement of Defence and the appellant's counterclaim struck out by the court. B

Where a ground of appeal is of mixed law and fact, it can only be filed after leave of the court has been sought and obtained in accordance with the relevant section of the Constitution. Non-compliance by the appellant in the instant appeal has rendered the appeal incompetent. Once there is a defect in competence, it is fatal and the proceedings are a nullity. C

Ajao v. Alao (1986) 5 NWLR pt. 45 pg. 802

Asore v. Lemomu (1994) 7 NWLR pt. 356 pg. 284

Udene v. Ugwu (1997) 3 NWLR pt. 491 pg. 57

Abbey v. Alex (1991) 6 NWLR pt. 198 pt. 459

Eke v. Ogbonda (2006) 18 NWLR pt. 192 pg. 506

Okeke v. Petmag (Nig.) Ltd. (2005) 4 NWLR pt. 915 pg. 245

Ugboaja v. Akintoye-Sowemimo (2009) 16 NWLR pt. 1113 pg. 278

I have to draw attention to the fact that it is no longer the law that once a ground of appeal alleges error in law and/or misdirection, the passage of the judgment concerning same must be quoted. F

Ilori v. Tella (2006) 18 NWLR pt. 1011 pg. 267

Once a preliminary objection to an appeal succeeds, there will be no need to go further to I consider the arguments in respect of the issues formulated for determination in the appeal. G

Mosoba v. Abubakar (2005) 6 NWLR pt. 922 pg. 460

N.E.P.A. v. Ango (2007) 15 NWLR pt. 737 pg. 627

With fuller reasons given by my learned brother in the lead judgment, I also arrive at the conclusion that the appeal is liable to be struck out. I adopt the consequential orders made in the lead judgment as mine. H